CBA | CONSUMER BANKERS ASSOCIATION

The Voice of the Retail Banking Industry

December 19, 2014

Via Electronic Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of *Ex Parte* Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

On December 18, 2014, the individuals below representing the financial services sector, higher education, health care, and the general business community (collectively, the "Representatives") met with Valery Galasso, Special Advisor and Confidential Assistant to Commissioner Rosenworcel:

- David Pommerehn, Vice President and Senior Counsel, Consumer Bankers Association
- Kate Larson, Regulatory Counsel, Consumer Bankers Association
- Jason Goldman, Senior Telecommunications Policy Counsel and Managing Director, Environment, Technology and Regulatory Affairs Division, U.S. Chamber of Commerce
- Monica Desai, Partner, Squire Patton Boggs, on behalf of ACA International
- Mark Brennan, Partner, Hogan Lovells US LLP, on behalf of United Healthcare Services, Inc.
- Wesley Platt, Associate, Hogan Lovells US LLP, on behalf of United Healthcare Services, Inc.
- Harrison Wadsworth III, Executive Director, Coalition of Higher Education Assistance Organizations; and Principal, Washington Partners, LLC
- Celia Winslow, Director, Legal and Regulatory Affairs, American Financial Services Association

Expanding on the December 15, 2014 meetings, the Representatives discussed the Consumer Bankers Association ("CBA") Petition for Declaratory Ruling ("CBA Petition")[1] that asks the Commission to clarify that "called party" means "intended recipient" for purposes of the statutory defense provided by Congress under the Telephone Consumer Protection Act ("TCPA") for calls made with the prior express consent of the "called party."[2] Supplementing

[1] *See* Consumer Bankers Association Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 19, 2014).
[2] 47 U.S.C. § 227(b)(1)(A)(iii).

the arguments already on the record, the Representatives urged the Commission to grant the CBA Petition because:

- Interpreting "called party" as the "intended recipient" gives meaning to the statutory defense of "prior express consent" of the called party
- "Intended recipient" is the most logical and straightforward definition of "called party"
- TCPA litigation risk is pervasive across most major industries
- Needless TCPA litigation burdens courts and ultimately hurts consumers
- FCC inaction perpetuates inconsistent law
- The responding comments overwhelmingly support the CBA Petition
- Arguments opposing the CBA Petition lack adequate foundation
- Clarification of current law serves the public interest

In addition to points noted in the December 17, 2014 *ex parte* ("Appendix 1"), the Representatives emphasized that communications to mobile phones especially stand to benefit lower income consumers due to the high percentage of wireless-only households. According to the Centers for Disease Control's ("CDC") recent 2013 National Health Interview Survey ("NHIS"), the number of American wireless-only homes telephones continues to increase.[3] The NHIS found that "two in every five American homes (41.0%) had only wireless telephones…during the second half of 2013."[4] The study also found that lower income consumers were more likely to be wireless-only and outlined "five demographic groups in which the majority live in households with only wireless telephones: adults aged 18–34, adults living only with unrelated adult roommates, adults renting their home, adults living in poverty, and Hispanic adults."[5] Moreover, the study noted the detrimental impact of restricting communications to landlines:

> The potential for bias due to undercoverage is not the only threat to surveys conducted only on landline telephones. Researchers are also concerned that some people living in households with landlines cannot be reached on those landlines because they rely on wireless telephones for all or almost all of their calls.[6]

This study plainly illustrates the need for communicating with mobile devices. Without this ability, consumers – especially lower income consumers – will be deprived of necessary information. Most troublesome is the impact on the lower income consumers who have the higher rate of wireless-only households and are in even greater need of critical financial and health information. Often, these households do not have another device that can access the Internet, which means that their mobile phones are their only means of receiving this important information.

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[3] Center for Disease Control: *Wireless Substitution: Early Release of Estimates From the National Health Interview Survey, July–December 2013* http://www.cdc.gov/nchs/data/nhis/earlyrelease/wireless201407.pdf

[4] *Id*.

[5] *Id* at 2.

[6] *Id* at 3.

This important point is further stressed in CBA's Response to the Consumer Financial Protection Bureau ("CFPB") Mobile Financial Services Request for Information ("Appendix 2"). In that response, CBA noted that "the Board of Governors of the Federal Reserve ("Federal Reserve") recognized the potential benefits resulting from increased mobile phone usage, asserting '[t]he relatively high prevalence of mobile phone and smartphone use among younger generations, minorities, and those with low levels of income – groups that are prone to be unbanked or underbanked – makes mobile phones a potential platform for expanding financial access and inclusion.'"[7] Moreover, 81% of unbanked households earn less than $30,000 per year, and mobile phones are the only means of accessing the Internet for 45% of that income bracket.[8] This data clearly shows that mobile communications are even more important to the economically vulnerable portion of the population and stresses the need for businesses to be able to engage in such communication.

Conclusion

We thank Ms. Galasso for taking the time to meet with us and welcome the opportunity to be a resource going forward. Again, we urge the FCC to fulfill their duty and come to a swift resolution on this important issue. By granting the CBA Petition, the Commission will establish a consistent standard that alleviates the threat of frivolous litigation and ultimately promote the beneficial communications that consumers need and often request. Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,

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cc: Valery Galasso

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[7] CBA, Comment Letter on the CFPB's Mobile Financial Services Request for Information pg. 1-2 (filed Sept. 10, 2014) (citing Board of Governors of the Federal Reserve System: Consumers and Mobile Financial Services 2014 pg. 4 (March 2014) http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201403.pdf).

[8] Consumer Financial Protection Bureau: *Request for Information Regarding the Use of Mobile Financial Services by Consumer and Its Potential for Improving the Financial Lives of Economically Vulnerable Consumers* pg. 4 (June 2014) http://files.consumerfinance.gov/f/201406_cfpb_request-for-information_mobile.pdf.

APPENDIX 1

December 17, 2014

Via Electronic Delivery

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Notification of *Ex Parte* Presentation, CG Docket No. 02-278

Dear Ms. Dortch:

On December 15, 2014, the individuals below representing the financial services sector, higher education, health care, and the general business community (collectively, the "CBA Representatives") met with: Adonis Hoffman, Chief of Staff and Senior Legal Advisor to Commissioner Clyburn; Amy Bender, Legal Advisor to Commissioner O'Rielly; Nick Degani, Legal Advisor to Commissioner Pai; and Mark Stone, Kristi Lemoine, and Aaron Garza of the Consumer and Governmental Affairs Bureau.[9]

- David Pommerehn, Vice President and Senior Counsel, Consumer Bankers Association
- Kate Larson, Regulatory Counsel, Consumer Bankers Association
- Jason Goldman, Senior Telecommunications Policy Counsel and Managing Director, Environment, Technology and Regulatory Affairs Division, U.S. Chamber of Commerce
- Monica Desai, Partner, Squire Patton Boggs, on behalf of ACA International
- Mark Brennan, Partner, Hogan Lovells US LLP, on behalf of United Healthcare Services, Inc.
- Wesley Platt, Associate, Hogan Lovells US LLP, on behalf of United Healthcare Services, Inc.
- Harrison Wadsworth III, Executive Director, Coalition of Higher Education Assistance Organizations; and Principal, Washington Partners, LLC.

The focus of the meetings centered on the Consumer Bankers Association ("CBA") Petition for Declaratory Ruling ("CBA Petition")[10] that asks the Commission to clarify that "called party" means "intended recipient" for purposes of the statutory defense provided by Congress under the Telephone Consumer Protection Act ("TCPA") for calls made with the prior

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[9] Mr. Goldman did not attend the meeting with staff from the Consumer and Governmental Affairs Bureau and Mr. Wadsworth did not attend the meetings with Mr. Hoffman or Ms. Bender.
[10] *See* Consumer Bankers Association Petition for Declaratory Ruling, CG Docket No. 02-278 (filed Sept. 19, 2014).

express consent of the "called party".[11] Supplementing the arguments already on the record, the CBA Representatives urged the Commission to grant the CBA Petition because:

- Interpreting "called party" as the "intended recipient" gives meaning to the statutory defense of "prior express consent" of the called party
- "Intended recipient" is the most logical and straightforward definition of "called party"
- TCPA litigation risk is pervasive across most major industries
- Needless TCPA litigation burdens courts and ultimately hurts consumers
- FCC inaction perpetuates inconsistent law
- The responding comments overwhelmingly support the CBA Petition
- Arguments opposing the CBA Petition lack adequate foundation
- Clarification of current law serves the public interest

Interpreting "Called Party" as the "Intended Recipient" Gives Meaning to the Statutory Defense of "Prior Express Consent" of the Called Party and is the Most Logical Definition of "Called Party"

The CBA Representatives emphasized that the TCPA's statutory defense of "prior express consent of the called party" is rendered meaningless unless the FCC clarifies that "called party" means "intended recipient". Moreover, the "intended recipient" definition of "called party" is the most clear, concise, and straightforward approach. We are sympathetic of the escalating TCPA docket that is weighing on the Commission and this clarification will minimize the need for further guidance on the issue going forward.

The FCC may not interpret "called party" in a way that effectively reads the "prior express consent" requirement out of the statute. No other term used by courts – subscriber, regular user of phone, or recipient of the call – has meaning when applied to the prior express consent portion of the statute. The CBA Representatives noted that in a recent *amicus* brief filed in *Nigro v. Mercantile Adjustment Bureau*, the FCC invoked its 2008 Clarification Order that states "prior express consent is deemed to be granted only if the wireless number was provided by the *consumer to the creditor*, and that such number was provided during the transaction that resulted in the debt owed."[12] In the brief, the FCC emphasized the only person who could give prior express consent is the party who incurred the debt in the transaction that resulted in the debt owed. Defining "called party" as anyone other than the "intended recipient" accordingly makes no sense in this context – how could a subscriber or regular user of the phone give consent if they are not involved with the transaction that resulted in the debt? The intended recipient is the only person who could consent because that is the person involved in the transaction that incurred the debt.

TCPA Litigation Risk is Pervasive across Industries

A wide range of commenters representing a variety of interests all agree that the Commission should clarify that "called party" means "intended recipient." These organizations

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[11] 47 U.S.C. § 227(b)(1)(A)(iii).
[12] *Albert A. Nigro v. Mercantile Adjustment Bureau, LLC*, No. 13-1362 (FCC *amicus* brief filed June 30, 2014) (italics added).

that are impacted by the pervasive litigation risk include the nonprofit community,[13] communications and social media companies,[14] educational institutions,[15] healthcare entities,[16] food service providers,[17] retailers,[18] employers[19] and every organization that needs to communicate rapidly with customers and the public — including government agencies such as this Commission.[20]

Needless TCPA Litigation Burdens Courts and Unnecessarily Hurts Businesses and Consumers; FCC Inaction Perpetuates Confusion and Inconsistent Laws

Currently, the overzealous Plaintiff's Bar is flooding courts across the country with class action lawsuits and the litigation risk is only set to increase as substantial judicial awards become more prevalent. Notably, there are attorneys advertising that plaintiffs can receive up to $1500 per TCPA violation and "laugh all the way to the bank."[21] Plaintiffs' firms have even been so brazen as to create an app to maximize recovery.[22]

In search of direction, courts have asked the FCC for clarity. Specifically, a recent federal court opinion noted that "[m]uch of the confusion is directly attributable to the FCC's own guidance on the TCPA" and quoted Commissioner O'Rielly's instructive blog post that read "[o]ver time, as the FCC and the courts have interpreted the TCPA, business models and ways of communicating with consumers have also changed. As a result, the rules have become complex and unclear… Indeed, the problems caused by this lack of clarity are evidenced by an increasing

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[13] Comments of National Council of Nonprofits to Rubio's Restaurant, Inc. Petition, CG Docket No. 02-278 (filed Sep. 24, 2014) (*"Nonprofits Council Comments"*).
[14] National Rural Electric Cooperative Association Notice of *Ex Parte*, CG Docket No. 02-278, CG Docket No. 02-278 (filed Oct. 1, 2014); letter from David H. Kramer and Tonia Ouellette Klausner to Marlene H. Dortch, Secretary, Federal Communications Commission in CG Docket No. 02-278 (Sep. 24, 2014); Comments of Twitter, Inc. in Support of Stage Stores, Inc.'s Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (Aug. 8, 2014) (*"Twitter Comments"*); Comments of Time Warner Cable Inc., CG Docket No. 02-278 (filed Mar. 10, 2014).
[15] Reply Comments of Ceannate Corp., Coalition of Higher Education Assistance Organization, Nat'l Ass's of College and University Business Officers, and Nat'l Council of Higher Education Resources, CG Docket No. 02-278 (filed Mar. 24, 2014).
[16] United Healthcare Services, Inc. Petition for Declaratory Ruling Regarding Reassigned Wireless Telephone Numbers, CG Docket No. 02-278 (filed Jan. 16, 2014) (*"United Healthcare Services Petition"*).
[17] Rubio's Restaurant, Inc., Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed Aug. 15, 2014) (*"Rubio's Petition"*).
[18] Stage Stores, Inc. Petition for Expedited Declaratory Ruling, CG Docket No. 02-278 (filed June 3, 2014).
[19] *Rubio's Petition, supra.*
[20] *See* Comments of Wells Fargo, CG Docket No. 02-278 (filed Oct. 29, 2014) at 8-10 (noting large number of government agencies, including this Commission, that use Twitter and other channels to communicate with the public).
[21] http://www.blockcallsgetcash.com/
[22] *Id*.

number of TCPA-related law suits and a growing backlog of petitions pending at the FCC. . . That is why the FCC needs to address this inventory of petitions as soon as possible."[23] We could not agree more.

Without clarity from the FCC, courts are ultimately forced to create their own interpretations, resulting in a patchwork of inconsistent rulings making liability dependent on the jurisdiction of the lawsuit, contrary to Congress' intent. For example, several courts have found correctly that "called party" must mean the "intended recipient," and that to find otherwise renders the "prior express consent" defense useless.[24] Other courts have held differently, finding that "called party" means "current subscriber," "regular user of the phone" and/or "the person who happened to answer the phone."[25] The FCC has the obligation to clarify the meaning so that there is one, consistent national interpretation – and to provide an interpretation that does not undermine Congressional intent.

Moreover, failing to grant the CBA Petition will have a chilling effect on communications that are important and valuable to consumers.[26] Removing such desired communication is completely contrary to the TCPA's intended purpose, given that "Congress did not expect the TCPA to be a barrier to normal, expected, and desired business communications."[27]

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[23] *Balschmiter v. TD Auto Finance*, United States District Court, E.D. Wisconsin (November 20, 2014) (citing Baird v. Sabre, Inc., 995 F.Supp.2d 1100, 1106 (C.D. Cal. 2014) (noting that part of the 1992 TCPA Order relating to prior express consent "is not a model of clarity")).

[24] Cases finding that "called party" means "intended recipient" include *Cellco P'ship v. Dealers Warranty, LLC*, No. 09–1814 (FLW), 2010 WL 3946713, at *10 (D.N.J. Oct. 5, 2010) (finding that the phrase "called party" means "the intended recipient of the call"); and *Leyse v. Bank of Am*., No. 09-7654, 2010 WL 2382400, at *4 (S.D.N.Y. June 14, 2010) (*"Leyse I"*) (unintended recipient not the "called party" because businesses will have no way of knowing whether the individual on the other end has given prior express consent). *See also Kopff v. World Research Grp., LLC*, 568 F. Supp. 2d 39, 40-42 (D.D.C. 2008) (unintended recipient of faxes lacks sanding to sue) Leyse v. Bank of Am., No. 11-7128, ECF No. [31] (D.N.J. Sept. 8, 2014) (unpublished opinion) ("Leyse II") (following the Southern District of New York's holding in Leyse I and holding that plaintiff lacks standing because he was not the intended recipient of the call).

[25] *See, e.g. Meyer v. Portfolio Recovery Assocs., LLC*, 707 F. 3d 1036, 1043 (9th Cir. 2012) (called party means "recipient"); *Soppet v. Enhanced Recovery Co*., 679 F.3d 637, 643 (7th Cir. 2012) (called party means "subscriber"); *Manno v. Healthcare Revenue Recovery Grp., LLC*, 289 F.R.D. 674, 682 (S.D. Fla. 2013) (called party means "the regular user of the phone").

[26] *See* Letter from Santander Consumer USA, Inc. to Marlene H. Dortch, Federal Communications Commission, Re: Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, GC Docket No. 02-278; Petition for Rulemaking of Consumer Bankers Association (CBA) at 2 (Nov. 17, 2014) (Santander Letter) ("The threat of TCPA litigation arising from calls to reassigned numbers, among other things, discourages important, time-sensitive informational communications that are legally mandated, improve money management, reduce avoidable fees, and promote customer service.")

[27] *GroupMe, Inc./Skype Communications S.A.R.L Petition for Expedited Declaratory Ruling*

The phrase “called party” plainly has different meanings as used in different contexts throughout the statute.[28] The task, therefore, is to determine the proper meaning of the phrase *in context*. Indeed, the United States Supreme Court recently chided the Environmental Protection Agency for thoughtlessly applying the credo “the same word means the same thing” when context – and common sense – reflected that Congress intended otherwise.[29] The fact that the definition of “called party” may be different in other parts of the TCPA is irrelevant. What is relevant here is the context of the statutory defense provided by Congress in Section 227(b)(1)(A)(iii) of the TCPA for calls made with the “prior express consent of the called party.” It is a “fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme,” and that “the presumption of consistent usage readily yields to context, and a statutory term – even one defined in the statute – may take on distinct characters from association with distinct statutory objects calling for different implementation strategies.”[30] The critical points are that (1) the meaning of “called party” is unclear on the face of the statute, and (2) the Commission should apply the most reasonable meaning consistent with Congressional intent.

The Comments Overwhelmingly Support the Petition

Support for the “intended recipient” approach stretches far beyond the financial services industry with representatives from the communications, education, energy, and retail sectors filing in agreement and cautioning about TCPA’s unintended consequences. Specifically, the following organizations supported the CBA Petition: the U.S. Chamber of Commerce (the “Chamber”), American Bankers Association, American Financial Services of America, Noble Systems, Coalition of Higher Education Assistance Organizations (“COHEAO”), the National Rural Electric Cooperation Association, Twitter, Santander, Wells Fargo, Computer and Communications Industry Associations (“CCIA”), Stage Stores, Genesys Telecommunications, and ACA International. Notably, the organizations provided the following instructive insight:

- **CCIA** pointed out that failure to resolve this question will encourage an ongoing TCPA litigation campaign that is “a serious threat to mobile communications and e-commerce.”
- **The Chamber** highlighted the evolving technological environment, impracticality of manually placing calls, and influx of class action lawsuits that are harming businesses;

Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, Declaratory Ruling, 29 FCC Rcd 3442 at 3444 (¶ 8) (2014). See H.R. Rep. 102-317, at 17 (1991).

[28] For example, the TCPA requires that a system sending a pre-recorded message to a phone line release the line “within 5 seconds of the time … the called party has hung up ….” 47 U.S.C. § 227(d)(3)(B). A “subscriber” to a phone line that does not actually “use” a phone (for example in a business plan context, or a family plan context) could never “hang up” because she/he does not physically possess the phone at the time of the call – someone else does. Hence, in this particular provision, “called party” can only mean “answerer,” not “subscriber.”

[29] *Utility Air Regulatory Group*, 134 S. Ct. at 2441.

[30] *Id.*

- **COHEAO** stated that continued failure to clarify the meaning of "called party" will inhibit the sending of informational messages that benefit students and educational institutions;
- **The National Rural Electric Cooperative Association** asserted that continued failure to resolve the reassigned-number problem will seriously affect rural cooperatives' ability to provide a high level of service to their member-customers;[31]
- **Stage Stores** described the adverse effect of the reassigned-number problem on consensual communications between retailers and customers; and other commenters stress this issue's importance to their industries in particular, and to consumers and the economy generally.[32]

Significantly, the commenters agree that:

- the statutory defense of "prior express consent of the called party" is rendered meaningless unless the FCC clarifies that "called party" means "intended recipient;"[33] and

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[31] Comments of the Coalition of Higher Education Assistance Organizations in Support of Petition for Declaratory Ruling of the Consumer Bankers Association, CG Docket No. 02-278 (filed Nov. 17, 2014) at 2-3 ("COHEAO Comments"); Comments of the National Rural Electric Cooperative Association, CG Docket No. 02-278 (filed Nov. 17, 2014) at 2-5 ("NRECA Comments").

[32] *See* Comments of Genesys Communications Laboratories, Inc., CG Docket No. 02-278 (filed Nov. 13, 2014); letter from Burton D. Billhart, counsel for Santander Consumer USA, Inc. to Marlene H. Dortch, CG Docket No. 02-278 (filed Nov. 17, 2014); Comments of Noble Systems Corporation, CG Docket No. 02-278 (filed Nov. 17, 2014) ("Noble Systems Comments"); Comments of Wells Fargo, CG Docket No. 02-278 (filed Oct. 29, 2014); Comments of ACA International, CG Docket No. 02-278 (filed Nov. 17, 2014) ("ACA Comments"); letter from Bill Himpler, American Financial Services Association, to Federal Communications Commission, CG Docket No. 02-278 (filed Nov. 17, 2014) ("AFSA Comments"); Comments of the American Bankers Association, CG Docket No. 02-278 (filed Nov. 17, 2014) ("ABA Comments"); *see also* Comments of Debbie Hennings, CG Docket No. 02-278 (filed Nov. 24, 2014); Comments of Emily Myers, CG Docket No. 02-278 (filed Nov. 24, 2014); Comments of Jan Widmark, CG Docket No. 02-278 (filed Nov. 24, 2014); Comments of Lori Sissing, CG Docket No. 02-278 (filed Nov. 24, 2014); Comments of Kara Paulson, CG Docket No. 02-278 (filed Nov. 21, 2014); Comments of Jill Point, CG Docket No. 02-278 (filed Nov. 21, 2014); Comments of Katherine M., CG Docket No. 02-278 (filed Nov. 17, 2014); Comments of Sherry Tunender, CG Docket No. 02-278 (filed Nov. 12, 2014).

[33] *See* Comments of ACA International at 5-6, *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Petition for Declaratory Ruling of the Consumer Bankers Association*, CG Docket No. 02-278 (Nov. 17, 2014) (ACA Comments) ("Any interpretation of 'called party' other than 'intended recipient' nullifies the 'prior express consent' exception because . . . it is impossible for callers to know with complete certainty to whom a telephone number is currently assigned, whether the person providing consent is the actual 'subscriber' of a number, or even who might just happen to answer the telephone.").

- it is impossible to solve for "wrong number" calls due to number reassignment or a person other than the "intended recipient" just randomly picking up the phone.[34]

Arguments against the Petition Lack Adequate Foundation

While we value all perspectives, we respectfully contend that the arguments filed in opposition to the CBA Petition lack sound foundation. An assertion that "there is no authority for the Commission to 'clarify' the definition of 'called party' under the TCPA"[35] is inaccurate. It is well-established that an agency charged with administering a statute has authority to interpret any ambiguous statutory terms therein.[36] Moreover, the Commission is not only authorized, but it is obligated to make such a clarification as the expert agency responsible for carrying out Congressional mandates related to the TCPA.[37] The comment submitted by the

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[34] *See* Noble Systems Comments at 4 ("[A] caller encountering the new subscriber should not be subject to liability under the TCPA for making such a call, if they did not know of the number reassignment <u>and</u> subsequently refrain from calling after being informed."); Santander Letter at 2 ("Businesses cannot avoid calling reassigned wireless telephone numbers."); NRECA Comments at 6 ("[T]here does not appear to be any credible evidence submitted to the Commission to date demonstrating the existence of any database that could instantaneously provide a caller with real time information on the reassignment of numbers."); Letter from William Carty, Public Policy Director, Twitter, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission Re: Consumer Bankers Association Petition for Declaratory Ruling CG Docket No. 02-278 (Sept. 19, 2014) at 2 (Nov. 17, 2014) ("[T]he only realistic way to avoid inadvertently sending a text to a number that has been reassigned would be to stop sending texts altogether."); Comments of the Computer & Communications Industry Association at 4, *Petition for Declaratory Ruling of the Consumer Bankers Association; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Nov. 17, 2014) ("At this [large] scale of reassignment, a caller cannot, without undue burden, track down mobile telephone numbers that might have been reassigned since consents were last obtained."); Comments of the American Bankers Association at 3, *Petition for Declaratory Ruling of the Consumer Bankers Association; Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991*, CG Docket No. 02-278 (Nov. 17, 2014) (ABA Comments) ("[F]inancial institutions – which place millions of authorized autodialed informational calls annually – cannot completely avoid calling reassigned wireless telephone numbers.").

[35] NCLC Comments at 5.

[36] *See Utility Air Regulatory Group*, 134 S. Ct. at 2439 ("Under Chevron, we presume that when an agency-administered statute is ambiguous with respect to what it prescribes, Congress has empowered the agency to resolve the ambiguity."); *Accord City of Arlington v. FCC*, 133 S. Ct. 1863, 1868 (2013) ("[I]f the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.").

[37] *See Utility Air Regulatory Group*, 134 S. Ct. at 2446 ("Under our system of government, Congress makes laws and the President, acting at times through agencies . . . "faithfully execute[s]" them. The power of executing the laws necessarily *includes both authority and*

National Consumer Law Center, et al. ("NCLC") claimed that calls to reassigned numbers generally are not inadvertent, but result from "a pervasive environment of industry indifference."[38] This speculation is unsupported by fact and is directly contradicted by the record before the Commission. The CBA Representatives emphasized the information in the record outlining carefully constructed best practices, including: providing mechanisms for individuals to update their contact information; encouraging or requiring individuals (e.g., through contractual provisions) to notify the caller when a telephone number changes; and periodically requesting confirmation that contact information remains accurate.[39] Moreover, many CBA members employ costly, yet ineffective, third party service providers purporting to identify when a number has been reassigned. These services are also not viable option for smaller businesses and non-profits due to the prohibitive expense. Despite these great lengths, calls to unintended recipients are still unavoidable.[40]

NCLC makes the equally unfounded assertion that granting the Petition would violate the TCPA's terms and harm consumers.[41] Contrary to NCLC's assessment, the important informational types of communications at issue – such as, for example, low balance alerts, data breach notices, prescription drug reminders – benefit consumers. Many of these communications are also time-sensitive, including personalized healthcare alerts, identity theft and data breach notifications, and other calls.

Another argument set forth by NCLC is that courts overwhelming have rejected the "intended recipient" argument.[42] Again, this is simply not the case. As discussed above, while some courts have used alternate definitions, others have supported the "intended recipient" approach, and the issue remains unresolved in many jurisdictions. The jurisdictional split makes prompt FCC action *more* crucial, not less.

Conclusion

We thank the Commission staff for taking the time to meet with us and considering these complex issues and welcome the opportunity to be a resource as future questions arise. We ask

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responsibility to resolve some questions left open by Congress that arise during the law's administration.") (emphasis added) (internal quotation marks removed).

[38] Comments of the National Consumer Law Center on Behalf of Its Low-Income Clients and the National Association of Consumer Advocates, Americans for Financial Reform, Consumer Action, Consumers Union, Public Citizen, and U.S. Public Interest Research Group ("Joint Comments"), CG Docket No. 02-278 (filed Nov. 17, 2014) at 3.

[39] See, e.g., Letter from Mark Brennan, Counsel, United, et al., to Marlene H. Dortch, Secretary, FCC, CG Docket No. 02-178 (filed July 28, 2014).

[40] Twitter states it makes every effort to remove reassigned mobile numbers from its popular messaging platform, and that the "lack of a comprehensive and current database of reassigned numbers means that the risk of reassigned number litigation can only be avoided by eliminating text messaging altogether, with disastrous consequences for consensual and socially desirable speech." Letter from William Carty, Twitter, Inc. to Marlene H. Dortch, CG Docket No. 02-278 (filed Nov. 17, 2014) at 1-2 ("Twitter Comments").

[41] *Id.* at 5-7.

[42] *Id.* at 7-9.

the FCC to fulfill their duty and come to a swift resolution on this important issue. Please do not hesitate to contact the undersigned with any questions.

Respectfully submitted,

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cc: Adonis Hoffman
Amy Bender
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Aaron Garza
Kristi Lemoine

APPENDIX 2

September 10, 2014

Ms. Monica Jackson
Office of the Executive Secretary
Consumer Financial Protection Bureau
1700 G Street, NW
Washington, D.C. 20552

Re: Mobile Financial Services Request for Information – Docket No. CFPB-2014-0012

Dear Ms. Jackson:

The Consumer Bankers Association ("CBA")[43] appreciates the opportunity to comment on the notice issued by the Consumer Financial Protection Bureau ("CFPB" or "Bureau") asking for input on how mobile banking is helping consumers utilize products, manage finances, and achieve financial goals. CBA strongly believes mobile platforms are beneficial tools, allowing consumers to conveniently and safely access traditional banking services and products. In light of these possibilities, we look forward to working with the Bureau on this important issue.

Mobile Usage and Mobile Banking are on the Rise

Once mere communication tools, mobile phones have fundamentally changed society, enhancing the way we access information, interact, and conduct business. For many of us, mobile phones are our dependable assistant, providing us with the ability to get news, check the weather, communicate over various platforms, play games, and log onto countless applications. Through mobile banking, cell phones now have the ability to improve one of the most important aspects of any household – financial management – by providing consumers with greater access, reduced costs, increased money management tools, and enhanced financial education.

As of 2013, 87% of the adult U.S. population had a mobile phone, 61% of which were "smartphones" with Internet capability.[44] Between 2012 and 2013, there was a 52% increase in smartphone ownership, with the adoption of smartphones highest among minority groups. Notably, 73% of Hispanic and 63% of African American populations use smartphones, compared to 58% of non-Hispanic whites.[45] The Board of Governors of the Federal Reserve ("Federal Reserve") recognized the potential benefits resulting from increased mobile phone usage, asserting "[t]he relatively high prevalence of mobile phone and smartphone use among younger generations, minorities, and those with low levels of income – groups that are prone to

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[43] The Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services — banking services geared toward consumers and small businesses. As the recognized voice on retail banking issues, CBA provides leadership, education, research, and federal representation for its members. CBA members include the nation's largest bank holding companies as well as regional and super-community banks that collectively hold two-thirds of the total assets of depository institutions.

[44] Board of Governors of the Federal Reserve System: *Consumers and Mobile Financial Services 2014* pg. 4 (March 2014) http://www.federalreserve.gov/econresdata/consumers-and-mobile-financial-services-report-201403.pdf.

[45] *Id*.

be unbanked or underbanked – makes mobile phones a potential platform for expanding financial access and inclusion."[46]

With the increase in mobile access, financial institutions have expanded their mobile banking[47] and mobile payment services.[48] In 2013, the amount of customers using mobile banking rose to 33% of all mobile phone users and 51% of smartphone users.[49] Though expanding less rapidly, mobile payments reached 17% of all mobile phone users and 24% of smartphone users.[50] These gains do not appear to be slowing – last year, 74,000 new users entered the mobile banking market *each day*.[51] Further, 12% of consumers who do not currently benefit from mobile banking stated they will either "definitely" or "probably" use a mobile banking service within the next 12 months.[52] Though speculative, planned use is strongly correlated to subsequent adoption.[53] According to AlixPartners, consumers in the following age brackets are somewhat likely to extremely likely to adopt mobile banking within the next year: 60% of 18 to 25 year olds, 49% of 26 to 34 year olds, 37% of 35 to 44 year olds, 23% of 45 to 54 year olds, 19% of 55 to 64 year olds, and 14% of people over 65.[54]

Evidence suggests those at risk for falling outside the mainstream banking system are more likely to engage in mobile banking than the general population.[55] Notably, 19% of unbanked household reported they would likely engage in mobile banking within the next year, as opposed to 9% of fully banked households.[56] Consequently, there is a burgeoning opportunity to serve unbanked and underbanked consumers who would otherwise be forced into the often unregulated and costly shadow banking system.

Mobile banking especially appeals to younger and minority consumers, who are generally more likely to be unbanked or underbanked. In 2013, consumers between the ages of 18 and 29 made up 39% of the mobile banking market, even though they only accounted for 21% of all mobile phone users;[57] and the Hispanic population made up 19% of the mobile banking market, even though they only represented 14% of all mobile phone users.[58] Moreover, AlixPartners found that smartphone/ tablet ownership among banked consumers is greater for Hispanic (76%), Asian (72%), and African American (69%) populations than the Caucasian population (59%).[59]

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[46] *Id*.
[47] *Id.* (defining "mobile banking" as "services that allow consumers to obtain financial account information and conduct transactions with their financial institutions").
[48] *Id.* (defining "mobile payments" as "services… that allow consumers to make payments, transfer money, or pay for goods and services").
[49] *Id*.
[50] *Id*.
[51] Consumer Financial Protection Bureau: *Request for Information Regarding the Use of Mobile Financial Services by Consumer and Its Potential for Improving the Financial Lives of Economically Vulnerable Consumers* pg. 1 (June 2014) http://files.consumerfinance.gov/f/201406_cfpb_request-for-information_mobile.pdf .
[52] Federal Reserve at 7.
[53] *Id.* at 8.
[54] Appendix pg. 1.
[55] FDIC 2014 at 17.
[56] *Id*.
[57] Federal Reserve at 9.
[58] *Id*. at 10.
[59] Appendix pg. 2.

Their research also concluded mobile banking adoption by the Hispanic (52%), African American (41%), and Asian (38%) populations outweighed the adoption by Caucasians (28%).[60]

The Wide-Ranging Benefits of Mobile Banking Reach All Segments of Society

Mobile banking has the ability to improve how all segments of society manage and access their finances. Although all Americans stand to benefit, mobile banking "is poised to have the largest impact for the underbanked through its ability to meet day-to-day financial service needs. The anytime, anyplace, and actionable nature of [mobile banking] offers the potential to enhance sustainability of banking relationships."[61] By definition "unbanked" households "do not have an account in a federally insured depository institution"[62] and "underbanked" are households that "have an account with a federally insured depository institution but also use [alternative financial services] to conduct transaction or credit services."[63]

As of 2013, approximately 17 million Americans were unbanked and 51 million were underbanked.[64] Mobile banking is in an excellent position to meet the needs of these consumers because 90% of underbanked adults own a mobile phone, with 71% owning a smartphone, as compared to 83% of the overall population.[65] Mobile phone usage among the unbanked is growing, with 68% owning a mobile phone, 49% of which are smartphones.[66] Moreover, 81% of unbanked households are lower income, earning less than $30,000 per year, and mobile phones are the only means of accessing the Internet for 45% of that income bracket.[67] Further, data from AlixPartners suggests that minorities are more likely to access the Internet via mobile phone than Caucasians, with 76% of Hispanics and 73% of African Americans using their mobile device as compared to 60% of Caucasians.[68]

Due to changing preferences, a similar opportunity exists for the younger generation. Of consumers between 18 and 45, 90% have cell phones, with almost two-thirds owning a smartphone, but only half to two-thirds of them are fully banked.[69] As stated in a Center for American Progress ("CAP") report, "mobile banking is a powerful tool for expanding access to banking services beyond the limits of traditional bank branches. It has enormous potential, particularly among the millions of Americans who may have a cell phone but do not have a bank account."[70]

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[60] *Id*.
[61] Federal Deposit Insurance Corporation: *Assessing the Economic Inclusion Potential of Mobile Financial Services* pg. 4 (April 23, 2014) https://www.fdic.gov/consumers/community/mobile/Mobile-Financial-Services-and-Economic-Inclusion-04-23-2014revised.pdf .
[62] *Id*. at 8.
[63] *Id*.
[64] *Id*. at 2.
[65] *Id*. at 2-3.
[66] *Id*. at 3.
[67] CFPB RFI at 4.
[68] Appendix pg. 3.
[69] Joe Valenti, Center for American Progress: *Banking by Hand(set): Using Mobile Banking to Expand Access* pg. 4 (June 13, 2013) http://cdn.americanprogress.org/wp-content/uploads/2013/06/ValentiMobileBanking-brief-2.pdf .
[70] *Id*. at 9.

Economic inclusion is vital to incorporate the 8% of Americans who do not have a relationship with a bank into the mainstream banking system, which provides consumers with safer products and wealth-building opportunities not available at nonbanks.[71] Importantly, the mainstream banking system "improves a consumer's ability to access a range of financial products and services, develop wealth, build a credit history, and access credit products."[72] This comment explores how mobile banking is already changing the financial landscape and improving the lives of the most economically vulnerable.

I. Increase Access

By nature, mobile banking can be used any place, any time. The "any place" capability expands access to millions of Americans who are unbanked or underbanked because they have difficulty visiting a branch due to distance, age, illness, or disability. According to a 2010 Pew Charitable Trust Study ("Pew Study"), 85% of unbanked Los Angeles residents choose their financial service providers – bank or nonbank – because of its proximity to where they lived.[73] Demonstrating mobile banking's influence, AlixPartners found that consumers switching banks valued mobile banking almost as much as account/ service fees and more than interest rates on deposits.[74] Further, for customers who changed banks over the past year, 65% indicated mobile banking played an important or extremely important role when choosing to switch.[75]

In our fast-paced, 24/7 society, being able to bank "any time" grants access to those who need more flexibility because they cannot visit a bank branch during normal business hours. The Pew Study found that 40% of those surveyed – both banked and unbanked individuals – were "very likely" to switch to a financial institution that operated during the evenings or on Sundays.[76] The importance of flexible timing is conveyed by the prepaid card provider, NetSpend, who reported 40% of prepaid card loads and deposits occurred outside traditional banking hours.[77]

In a 2011 report, the FDIC found the main reason consumers cited for using nonbank services was convenience, and nonbank credit products because consumers felt they were easier or faster to get than bank credit.[78] Filling this gap, mobile banking offers a convenient platform for customers to bank anywhere, any time within the secure confines of the regulated mainstream banking system.

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[71] FDIC 2014 at 7.
[72] *Id*.
[73] Pew Charitable Trusts: *Unbanked By Choice: A Look at How Low-Income Los Angeles Households Manage the Money They Earn* pg. 10 (July 20, 2010) http://www.issuelab.org/resource/unbanked_by_choice_a_look_at_how_lowincome_los_angeles_households_manage_the_money_they_earn .
[74] Appendix pg. 4.
[75] Appendix pg. 5.
[76] Pew at 10.
[77] CAP at 4.
[78] FDIC: *National Survey of Unbanked and Underbanked Households* (September 2012) http://www.fdic.gov/householdsurvey/2012_unbankedreport.pdf .

II. Decrease Banking Costs and Improve Money Management

Through mobile banking, consumers are able to save money in a variety of ways, including reducing their banking costs, employing real time money management, and utilizing applications to help reach their financial goals.

a. Lower banking costs

By expanding access, mobile banking gives consumers the opportunity to engage in the mainstream banking system, dramatically decreasing costs incurred at nonbanks for the same services, such as paying bills, cashing checks, getting small-dollar loans, and making remittance transfers. Currently, about 38% of unbanked households use nonbank check cashers, with fees that can escalate to 2% to 5% of their paycheck.[79] Mobile banking eliminates that expense with remote deposit capture ("RDC"), which allows customers to electronically deposit checks at any time by taking a picture of the check with their smartphone. Last year, over three-fourths of the 25 largest banks offered RDC, with over 25% of mobile banking users performing the service over a 12 month period. At a recent CFPB field hearing, CAP Director of Asset Building, Joe Valenti, asserted that RDC essentially gives consumers a "raise" by eliminating the need for check cashing services.[80] Though funds are not always immediately available with RDC, many of our members are launching innovative approaches to meet consumer preferences. For example, Regions Bank gives customers different options depending on their personal needs, charging the following fees to post funds at specified times: 50 cents within two business days, $3 for the same night, and 1% to 3% of the check amount for immediate access, with a $5 minimum.[81] This way, customers get much needed liquidity almost instantaneously, making expensive check cashers obsolete. This cost-saving technology is especially well-suited to serve the unbanked and underbanked because it provides the any place, any time convenience they value.

Consumers are increasingly using their phones to check account balances before making in-store purchases. Over a 12 month period, 69% of mobile banking customers checked their account balance on their phone before making a larger purchase, with half of them choosing not to make the purchase after learning their balance.[82] Moreover, 89% of underbanked consumers used mobile banking to check their balance before making a purchase over a 12 month period.[83] By creating a more informed consumer, remotely checking account balances also cuts down on overdraft fees that would have been incurred if the purchase was made despite insufficient funds.

b. Real time money management

Checking account balances before making a purchase not only decreases overdraft fees, but also fosters real time money management. Supporting this benefit, the Federal Reserve

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[79] CAP at 1.
[80] CFPB: Live from El Paso http://www.consumerfinance.gov/blog/category/video/livestream/
[81] CAP at 7.
[82] Federal Reserve at 19.
[83] FDIC 2014 at 22.

explained "[b]ecause many customers have near-constant access to their mobile phones, these devices have the potential to provide 'just-in-time information' that can influence consumer financial behavior and help them to make different, and perhaps smarter, financial decisions."[84] As noted above, knowledgeable consumers are better equipped to take control of their finances and often change their spending habits, resulting in reduced fees and increased savings.

Even without a smartphone, customers can manage their money by receiving the numerous text alerts provided by CBA members, including low balance alerts, statement notifications, payment due alerts, deposit or withdraw alerts, fraud alerts, credit balance notifications, and saving reminders.[85] Studies indicate that 27% of customers who engage in mobile banking receive text alerts and, in 2013, 77% of the 26 largest banks offered text alerts.[86] After receiving a text alert, consumers change their financial behavior by: transferring money into their account (47%); reducing their spending (37%); and depositing money into their account (32%).[87]

Additionally, customers can use mobile banking to better manage their finances with bill pay, person-to-person transfers, and remittance transfers. These services are especially valuable to unbanked and underbanked consumers because they provide ways to stay current with bills and create a more reliable snapshot of their financial situation. As of 2013, 60% of both underbanked and fully banked mobile banking customers made a payment using their banks' mobile app or website.[88] In the same year, 27% of all mobile banking customers and 29% of underbanked customers utilized person to person payments using their mobile device.[89] Beyond the financial benefits, these services save time otherwise spent paying the person owed, visiting a money transfer store, or getting a money order.[90] And of paramount concern to CBA members, mobile remittance transfers promote customers' safety by protecting them from the risks of carrying large sums of money.[91]

c. Reach financial goals

By facilitating money management, mobile banking creates more informed consumers who have the resources to improve their savings and meet their financial goals. The FDIC highlights that "savings trackers could help consumers visualize the progress they are making toward their savings goals," "embedded alerts and messages could motivate them to keep up with their savings plans," and "automatic transfers between accounts could help customers set money aside for different purposes."[92] Reaching financial goals allows our customers to be prepared for all life's challenges and stages, from saving for their child's college to making a down payment on their dream home. Realizing this potential, many CBA members have created tools that allow customers to track finances, understand spending patterns, and monitor expenses.

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[84] Federal Reserve at 19.
[85] *Id*.
[86] FDIC 2014 at 22.
[87] Federal Reserve at 19.
[88] FDIC 2014 at 26.
[89] *Id*.
[90] *Id*.
[91] *Id*. at 27.
[92] *Id*. at 32.

Exhibiting these benefits, PNC Virtual Wallet helps consumers develop money management skills and avoid costly mistakes by giving them visual, interactive tools to manage their finances.[93] Virtual Wallet contains a "Spend" account, an interest-bearing "Reserve" account, and a higher-yield "Growth" account to help customers segment their money for different needs.[94] It uses a "Money Bar" to show a customer's balance in segments of what is scheduled to come out and what is free to spend.[95] Other tools visually illustrate where customers spend money by breaking down monthly spending into categories.[96] To help avoid costly mistakes, Virtual Wallet comes with overdraft protection, alerts users with on-screen, email, or text alerts when they are most at risk for an overdraft, and even enables them to easily transfer money into the Spend account.[97] The mobile banking format is tailored to appeal to today's consumers, as 60% of Millennials indicate they use mobile banking more than any other banking method.[98] Taken together, these features create a more informed customer who is better equipped to meet their financial goals and transition into adulthood with established credit and money management skills.

III. Foster Sustainable Banking Relationships

Mobile banking offers a new way to appeal to consumers that would traditionally avoid the mainstream banking system, establishing a relationship that otherwise would not have occurred. In fact, unbanked consumers are more likely to use mobile banking than the general population. In a 2012 report, the Federal Reserve found that the unbanked population were the least likely to not see any benefit from mobile payments, with 15% of unbanked, 30% of underbanked, and 40% of fully banked indicating they did not see a benefit.[99] The fully bank's comparatively high percentage may indicate satisfaction with their banking experience.

Building off these preferences, mobile banking has the ability to foster economic inclusion, while also engaging current customers. With mobile banking, we are better able to meet our customers' needs, ensure disclosures are transparent, reduce unnecessary fees, and help prevent fraud.[100] As discussed above, RDC, text alerts, money management tools, and other mobile banking features enable us to better serve our customers, building deeper relationships and keeping them in the regulated, secure banking industry. The high degree of satisfaction with mobile banking supports the notion that our customer relationships are thriving – 80% of respondents are extremely or very satisfied with their mobile banking experience at their primary bank.[101] According to the Pew Study, banked households are more likely to save for the future,

[93] https://www.pnc.com/virtual-wallet/
[94] *Id*.
[95] *Id*.
[96] *Id*.
[97] *Id*.
[98] TD Bank: The Millennial: Financial Behavior & Needs (February 10, 2014) https://mediaroom.tdbank.com/index.php?s=30403&item=34208
[99] FDIC 2014 at 18.
[100] *Id*. at 21.
[101] Appendix pg. 6.

creating sounder financial futures for those with depository relationships opposed to those using non-bank products and services.[102]

<u>Mobile Banking is Primed to Improve Security and Decrease Fraud</u>

While mobile banking provides ample benefits, privacy and security are understandable concerns when developing technology. Specifically, our members are focused on risks associated with misplaced or stolen devices and cyber-attacks. Financial institutions are innovators in information security, which is exhibited by the sector's comparatively negligible amount of data breaches, accounting for just 3.7% of all data breaches in 2013.[103] Despite the low incident rate, we are exceedingly concerned that our customers' information is safe and are constantly developing technology to ensure its protection.

As many of us can unfortunately attest, the portable nature of mobile phones makes potential loss or theft an unavoidable reality. To combat the compromise of data, our members go to great lengths to secure sensitive information. For example, some members automatically log customers out when locking their mobile screen, require authentication to make a transaction, and send follow-up emails or texts to confirm transaction completion. While cyber-criminals will inevitably attempt to proliferate phishing scams and install malware in this digital age, our members continually monitor accounts for suspicious activity to shield consumers from attacks and protect their personal information.

In fact, mobile banking has the potential to provide greater security of sensitive financial information by employing cutting-edge programs such as document authenticity technologies, location-tracking capabilities, and biometric authentication.[104] In terms of document authenticity, vendors have created programs that use a cell phone's camera to scan documents to insert necessary information into a financial application, while letting banks assess the authenticity of the document.[105] Location-tracking capabilities help banks combat fraud by allowing them to identify a customer's actual location.[106] Finally, biometric authentication, including facial, voice, and fingerprint recognition, is an innovative capability that enhances security and minimizes fraud.[107] Moreover, these features have the power to increase consumers' knowledge of mobile security practices and reduce their banking costs by diminishing fraud losses.[108]

<u>Federal Government Involvement</u>

As mobile banking continues to improve the banking experience, we urge the federal government to provide a flexible regulatory structure that supports innovation and allows mobile banking to reach those who need accessible, cost-effective financial products the most – the

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[102] Pew at 3.
[103] Identity Theft Resource Center: *2013 Data Breach Category Summary* http://www.idtheftcenter.org/images/breach/2013/BreachStatsReportSummary2013.pdf.
[104] FDIC 2014 at 31.
[105] *Id*.
[106] *Id*.
[107] *Id*.
[108] *Id*.

unbanked and underbanked. Mobile banking has the opportunity to promote access, provide low-cost products and services, foster money management, cultivate long-lasting relationships, and strengthen information security – all of which are our members' preeminent focuses. However, mobile banking will not be able to reach its full potential if growth is hampered by unnecessarily burdensome and expansive regulation, especially given the substantial regulatory cost already imposed on the financial sector.

I. Encourage Innovation

As seen in prior rulemakings, regulators understand the importance of fostering innovation. In response to the Federal Trade Commission's ("FTC") proposed amendments to the Telemarketing Sales Rule, Retail Payments Product Director Marie Gooding of the Federal Reserve Bank of Atlanta ("FRBA") voiced concerns about the proposed rulemaking's chilling effects on the use of different forms of electronic checks and payments.[109] Specifically, Director Gooding cautioned "it is not clear to FRBA what the future might hold if the industry is free to innovate with [remotely created payment orders], but there may be upside possibilities both with respect to efficiency and the adoption of authentication that could offer much more consumer protection than what currently exists under the law that applies to checks."[110] She urged the FTC to delay the rulemaking until the industry and other stakeholders could collaborate with regulators to build "consumer protections into the mainstream uses of these payment orders before banning their use as a deceptive and abusive practice."[111] As a FRBA regulator, Director Gooding's support of regulatory restraint to encourage innovation is especially noteworthy. Her comments underscore the importance of allowing technology to organically evolve to ensure innovators are free to create products that better protect consumers.

Equally important, overly broad regulation of unrelated financial products may inadvertently regulate mobile banking and payments. As an example, New York's proposed rule establishing legal parameters around rapidly developing Virtual Currencies has the potential to encompass aspects of mobile banking.[112] Under the proposed rule, Virtual Currency is "broadly construed to include digital units of exchange that i) have a centralized repository or administrator; ii) are decentralized and have no centralized repository or administrator; or iii) may be created or obtained by computing or manufacturing effort."[113] Further, the proposal defines "transmission" as the "transfer, by or through a third party, of Virtual Currency from one Person to another Person."[114] Under these definitions, the proposed rule may be construed to regulate Person to Person payments, tokenization, and other mobile banking features. As the digital world evolves, we urge regulators to construct laws with caution so unintended technology and services are not accidentally swept under the regulatory umbrella.

II. Promote the Already Effective Privacy Laws and Coordinate Between Agencies

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[109] Marie Gooding, Federal Reserve Bank of Atlanta: *Telemarketing Sales Rule Comment Letter* (August 8, 2013).
[110] *Id*. at 3.
[111] *Id*.
[112] New York State Department of Financial Services: Title 23, Chap. 1, Part 200 Virtual Currencies (Proposed Rule) http://www.dfs.ny.gov/about/press2014/pr1407171-vc.pdf.
[113] *Id*. at 5.
[114] *Id*.

The financial sector is one of the most regulated industries and already adequately protects consumer privacy interests through a myriad of federal and state statutes and regulations, while also voluntarily implementing guidances and industry best practices. Notably, consumer information is already being safeguarded by: the Gramm-Leach-Bliley Act ("GLBA");[115] the Fair Credit Reporting Act ("FCRA");[116] the Fair and Accurate Credit Transactions Act ("FACTA");[117] and the Dodd-Frank Wall Street Reform and Consumer Financial Protection Act ("Dodd-Frank").[118] These laws already effectively protect consumer information, as seen by the low incidence of compromised data noted in the previous section.

Similarly, federal agencies are already adequately supervising mobile banking. Specifically, the FTC currently oversees mobile applications and holds companies accountable for inadequately protecting consumer information. Demonstrating this oversight, the FTC recently settled with two companies that allegedly disabled their secure sockets layer ("SSL") certificate, which is used to encrypt consumer data and guard against hackers.[119] In the consent orders, the FTC mandated the companies implement specific security programs according to detailed compliance procedures.[120] The argument for maintaining the current agency oversight is strengthened by the confusion often created by fragmented laws, as described by Director Gooding. In her letter to the FTC, she stated "it is clearly preferable public policy not to create a fragmented 'law of payments' in which multiple federal agencies take differing and/or conflicting views…."[121] In light of these concerns, we urge federal agencies to effectively coordinate and exercise restraint where other agencies are already successfully governing, which in turn will lead to more cohesive and straightforward regulation.

III. Foster Lower Banking Costs and Level the Playing Field

In the past, well-meaning regulation has increased costs for banks, driving them to eliminate affordable, highly regarded products. After the financial crisis, over regulation forced many of our members to stop offering free checking accounts and other valuable products and services, in turn unavoidably increasing fees to consumers. Despite the CFPB's claim that mobile banking lowers transaction costs for banks,[122] in actuality, mobile banking imposes great expense on our members through research and development, innovation, vendor management, system maintenance, and cybersecurity mearsure.

As overregulation increases the costs for banks, many startup nonbanks have entered the market free from banking regulatory burdens and capitalized on the uneven playing field. This

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[115] 15 U.S.C. § 6801 et seq.
[116] 15 U.S.C. § 1681 et seq.
[117] Pub. L. No. 108-159 (Dec. 4, 2003).
[118] Pub. L. No. 111–203 (July 21, 2010).
[119] American Banker: *FTC Settles with Credit Karma, Fandango Over App Security* (August 19, 2014) http://www.americanbanker.com/issues/179_160/ftc-settles-with-credit-karma-fandango-over-app-security-1069497-1.html
[120] FTC: Fandango Decision and Order Docket No. C-4481 (August 13, 2014) http://www.ftc.gov/system/files/documents/cases/140819fandangodo.pdf; FTC: Credit Karma Decision and Order Docket No. C-4480 (August 13, 2014) http://www.ftc.gov/system/files/documents/cases/1408creditkarmado.pdf
[121] FRBA at 2.
[122] CFPB RFI at 5.

inherent inequality makes it difficult for our members to compete with the rapidly expanding tech industry, giving way to a prevalence of unregulated financial applications. Not only is the uneven playing field unfair, it also gives startup products an advantage even when they may not have the most current customer information, creating an imprecise financial snapshot. Banks, on the other hand, maintain the consumer's financial information that they push to applications and mobile services as transactions occur. Promoting a flexible regulatory structure allows banks to compete with unencumbered startups and design programs that are more responsive to consumer spending.

In light of these issues, we hope regulators will consider potential unintended consequences that may ultimately hurt the consumers we all seek to serve. Furthermore, lower income consumers disproportionately bear the brunt of overregulation because of their greater need for short term capital, relative hardship from higher fees, and increased risk of being pushed into the shadow banking industry. To best serve the unbanked and underbanked, we ask regulators to support the expansion of mobile banking by encouraging the creation of innovative products that increase access, decrease costs, promote mainstream banking relationships, and improve money management.

Conclusion

Building upon growing mobile availability and changing preferences, mobile banking is in a unique position to fill the needs of the unbanked and underbanked. As stated by the Federal Reserve, "[g]iven the prevalence of mobile phones – particularly smartphones – among minorities, low-income individuals, and younger generations, mobile technology has the potential to empower consumers and expand access to financial services for underserved populations."[123] We urge the federal government to support the potential benefits of mobile banking by allowing our members to maintain cost-effective products and services, while pursuing innovation.

Again, we appreciate the opportunity to comment and would be happy to be a resource as you explore the emerging world of mobile banking. If you have any questions, please do not hesitate to contact me at 202-552-6366.

Respectfully submitted,

KLarson

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[123] Federal Reserve at 21.